No. 80-1580

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IN THE

# Supreme Court of the United States

October Term, 1980

BOARD OF TRUSTEES OF LINCOLN UNIVERSITY, LINCOLN UNIVERSITY, and HERMAN BRANSON, individually and as President of Lincoln University,

*Petitioners,*

*v.*

C. JAMES TROTMAN, MARY FARRELL, ANDREW MURRAY, VIRGINIA GUNN, THOMAS JONES, JULIUS BELLONE, DEFOREST RUDD, PETER F. HOFFER, MARIANNE RUSSO, DONALD PIERCE, RICHARD WINCHESTER, WILLIAM T. JOHNSON, EDWARD B. GROFF and LELAND SMUCKER,

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## I. COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

Did the court of appeals err in reversing the district court and remanding for a new trial, and should this nonfinal judgment be reviewed at this time?

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## II. COUNTERSTATEMENT OF THE CASE

Petitioners (defendants below), as they have throughout this litigation, focus on the underlying controversy between the faculty and administration at Lin-

coln University and wholly fail to analyze or discuss their concrete actions that form the basis of plaintiffs' constitutional claims — including explicit, written threats of dismissal directed at specific faculty members and a variety of punitive actions based on constitutionally protected speech.

The underlying conflicts between the administration and faculty do not raise constitutional issues and, unfortunately, are not unusual on college campuses in recent years. They concern issues like class size and the student/faculty ratio, and many reflect the shortage of funds available for education. What is unusual — and raises the constitutional issues decided by the court of appeals but mischaracterized and evaded in the Petition — is the administration's response to faculty disagreement and criticism: the administration and board of trustees of Lincoln, particularly the president, have punished, threatened, intimidated and suppressed faculty members with whom they disagree.

Lincoln is a predominantly Black institution with a long, rich history of academic freedom, democracy and achievement. Defendant Branson was appointed president in 1970 and early demonstrated an inability to tolerate criticism or disagreement. His intolerance first took the form of overly heated rebuffs and veiled threats. As the campus became embroiled over issues like class size and student/faculty ratio, the threats were no longer veiled. Constitutionally protected speech was prohibited; discipline was meted out with no regard for due process; and faculty members who were outspoken in opposition were removed as chairs of departments, involuntarily retired, denied deserved promotions, and discharged.

At the height of the controversy over the student/faculty ratio in the Spring 1977, Branson took an action that is unprecedented in legal or academic history. Citing what he claimed was a requirement to reduce the faculty to about three-quarters of its existing number, he sent one-year termination notices to *every*

faculty member, without regard to tenure status, seniority or likelihood of being among those supposedly to be terminated. This plan, referred to as "retrenchment" on the campus and in the record, was divulged to a committee of the faculty when Branson showed them a copy of the termination notices and announced that he would send them within one week. These retrenchment notices led to a vote of the faculty — by a margin of 46 to 10 — for the censure and removal of Branson.[1]

However, there was no retrenchment.[2] Several months later all but one of the retrenchment notices were rescinded. The faculty was not reduced by one-quarter; indeed, in that period, Branson hired *additional* faculty.

The one retrenchment notice not withdrawn was directed at Plaintiff Trotman, former chair of the English Department and an outspoken critic of the administration. Branson used the retrenchment plan as his critics had feared: although there was no retrenchment, the retrenchment notices were used to fire a leading critic of Branson by interpreting them to satisfy the one-year notice requirement for discharging a faculty member for other reasons.[3] Two binding arbitrations have resulted in judgments in favor of Trotman, but defendants have refused to abide by these arbitrations.[4]

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1. In the same period, a substantial portion of the Board was also dissatisfied with Branson, and five Board members resigned in late 1977 and early 1978.

2. This, and other facts stated herein, are either found by the court of appeals or are undisputed in the record.

3. Petitioners distort and mischaracterize the record in their description of Plaintiff Trotman's dismissal. See Opinion, A6-A7. See also footnote 4, *infra*.

4. The arbitrations are described by the court of appeals, App. A16, A16n.3. They resulted in orders that Trotman be reinstated with back pay. The second arbitration award included a specific finding that defendants acted in "bad faith" and retaliated against Trotman based on his criticisms of them. The award is being challenged by defendants in the state courts, but the only allowable grounds for the challenge are jurisdictional, and plaintiffs believe the appeal is frivolous.

Plaintiffs, who constituted twenty-five percent of the faculty when this lawsuit was filed (Opinion, App. A2), engaged in a variety of protected activities to express their views on these and other matters, including speaking out in faculty meetings, writing to state officials, writing letters to the editor that appeared in newspapers, speaking to the press, and picketing. The administration, of course, also has the right to express its views. But defendants have gone far beyond expression or disagreement with the accuracy or wisdom of plaintiff's positions.

The specific acts of defendants that formed the basis of plaintiffs' claims are well-described in the opinion of the court of appeals (App. A6-A15) under the following headings: (1) Dismissal of Trotman; (2) "Retirement" of Edward Groff (the "retirement" was involuntary); (3) Removal of Johnson from Chemistry Chair; (4) Arrests of Trotman and Farrell; (5) Bellone letter (threatening a faculty member with dismissal if he made a particular motion at a faculty meeting); (6) Disciplinary Meeting on Communication (defendants invited plaintiffs to a "meeting" that was actually a disciplinary hearing against plaintiffs for criticizing another faculty member in a memo); (7) Branson Letters Regarding Press Communications (concerning a series of letters from Branson to plaintiffs threatening discipline for speaking to the press); (8) Telegram Regarding Faculty Picketing; (9) Other Alleged Unconstitutional Conduct.

Respondents rely on the opinion of the court of appeals and will not restate or even sunmmarize these actions here. However, since Petitioners have wholly failed to analyze or discuss *any* of the concrete actions at issue and have seriously mischaracterized them,[5] we briefly

5. For example, Petitioners characterize their actions as "*after-the-fact* protests" (Petition, at 16; emphasis in original) when some, including the telegram quoted *infra*, were clearly before-the-fact and constitute prior restraints.

set out below the facts concerning one of these incidents so the matter — and constitutional import — will be clear.

In late April 1978, faculty members decided to conduct a peaceful vigil or picket during a visit to the campus by former President Ford. The vigil was not directed against the President but only attempted to draw his and others' attention to the problems at Lincoln. The night preceding the vigil, plaintiffs received this phone-delivered telegram at their homes (App. A12-A13):

> "Lincoln University considers any faculty picketing during term of collective bargaining to be in violation and unprofessional conduct, a cause for discipline up to dismissal.
>
> J. Freedley Hunsicker, Jr.
> *Attorney for the University*"

Mr. Hunsicker, who also represents Petitioners on this Petition,[6] testified at trial that the telegram was "authorized and sent by Branson." Opinion of the Court of Appeals, App. A12-A13. This constitutes a total ban on all picketing — without regard to time, place, manner or subject matter and with the most severe penalty possible and home delivery on the eve of a protected vigil.

The procedural context of the case is also at least left unclear in the Petition (at 7). This is an interlocutory

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6. Mr. Hunsicker was primary counsel for Petitoners-defendants throughout this litigation although he was a fact witness and his personal conduct is very much at issue. Plaintiffs raised the conflict of interest issue at the beginning of the trial. As counsel for Defendant Branson, Mr. Hunsicker had objected at a deposition, based on the attorney-client privilege, to questions asked of Branson concerning legal advice received from Mr. Hunsicker and the possibility of Branson's raising a good faith defense. Branson later testfied that Mr. Hunsicker had not discussed this objection or the attorney-client privilege with Branson prior to raising the objection, and when the whole matter was brought to the attention of the district court, Mr. Hunsicker withdrew his objection.

petition since the court of appeals only vacated the district court's dismissal of the case and remanded for a new trial. Opinion, App. A29-30.

## III. SUMMARY OF ARGUMENT

The court of appeals reversed and remanded this matter to the district court for a new trial based on clearly established principles and legal errors. The Petition basically ignores the actual decision and requests review of issues that are either not ripe or not presented at all in this case.

## IV. REASONS FOR DENYING THE WRIT

We discuss the substance of the Petition below, but it should be denied, in any event, because it is interlocutory. The court of appeals has only remanded the case to the district court for a new trial, so Petitioners are seeking review of a nonfinal judgment. In this procedural posture, certiorari is inappropriate absent "extraordinary inconvenience and embarrassment in the conduct of the case," *American Construction Co.* v. *Jacksonville, T. and K.R. Co.*, 148 U.S. 372, 384 (1893), which Petitioners have neither claimed nor addressed in the Petition. See also *Youngstown Co.* v. *Sawyer*, 343 U.S. 579, 584-85 (1952); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. and Co.*, 240 U.S. 251, 258 (1916); *Brotherhood of Locomotive Fireman* v. *Bangor and Aroostook R.R.*, 389 U.S. 327 (1967); *Estelle* v. *Gamble*, 429 U.S. 97, 114 (1976) (Mr. Justice Stevens, dissenting).

Petitioners claim that the court of appeals departed from established principles of law in several respects. However, Petitioners have substantially misunderstood and/or misrepresented the court of appeals decision and have basically asked this Court to review issues that are either not ripe or not presented at all in this case. The

court of appeals carefully analyzed the district court's decision and determined that the trial court made several specific legal errors in dismissing plaintiffs' case. Since Petitioners essentially ignore these errors, we have briefly summarized them before discussing Petitioners' claims.

### A. The Court of Appeals Decision

The court of appeals separately analyzed the three categories of constitutional violations alleged by Plaintiffs-respondents: (1) defendants' restrictions on plaintiffs' protected speech; (2) defendants' retaliatory actions against plaintiffs for protected speech; and (3) other alleged unconstitutional activities by defendants (mainly based on due process violations). The court held that the district court made errors of law in analyzing the first two categories and failed to address the claims in the third category, thus requiring reversal and a remand for a new trial.

Concerning the restrictions on speech, the court of appeals found that the district court had rejected plaintiffs' claims on the novel and erroneous grounds that defendants had acted in good faith and that defendants' actions did not totally deter plaintiffs from exercising their speech rights.

As to the good faith argument, the court of appeals correctly concluded that good faith cannot justify a constitutional violation, but rather is only relevant to the liability of individuals for damages. App. A19-A20. Since plaintiffs sought declaratory and injunctive relief against all the parties (including the University) as well as damages, good faith was not dispositive of their claims. See, e.g., *Wood* v. *Strickland*, 420 U.S. 308 (1975); *Owens* v. *City of Independence*, 100 S.Ct. 1398 (1980).

The court of appeals rejected the second justification on three grounds: (1) the district court erroneously excluded testimony by plaintiffs and other faculty mem-

bers concerning the chilling effect of defendants' activities (App. A21-A22); (2) plaintiffs had, in any event, presented sufficient evidence of a chilling effect (App. A20-A21); and (3) even if plaintiffs were not totally deterred — iced, as opposed to chilled — they still can obtain relief (App. A20). On the last point, the court said:

> "It would indeed be ironic were we to hold that persons who are persevering and resolute, who overcome their inhibitions and fears to proceed on a course they believe constitutionally protected, would thereby lose the very protection which they rely on in asserting their rights." (App. A20).

The court of appeals found two errors in the district court's analysis of plaintiffs' retaliation claims. Contrary to defendants' assertions, the court clearly recognized that it is necessary to balance rights of freedom of expression against the institution's interests, consistent with the principle established in *Pickering* v. *Board of Education*, 391 U.S. 563 (1968) and its progeny. App. A15, A25-A27. It concluded, however, that the district court adopted an erroneous standard. The district court held that the employee's speech is not protected if it has any "potentially disruptive impact," including remote, minor and wholly hypothetical impacts and without any need to balance such factors against plaintiffs' free speech rights. App. A67. It was the district court that failed to balance, and its standard would sanction suppression of almost all speech.

Although the court of appeals found that this standard was inappropriate, it concluded that this error alone might not warrant reversal. The court remanded because the trial court also erred in placing the burden upon plaintiffs to show that defendants' retaliatory actions would not have taken place "but for" the occurrence of the protected conduct, which is directly contrary to *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 416-17, (1979) and *Mt. Healthy*

*City Board of Education v. Doyle*, 429 U.S. 274, 287 (1977). App. A27-A28. See also Petition, at 10-11, where this error is essentially conceded.

Finally, the court of appeals noted that there were other constitutional claims which were not even addressed by the trial court. It remanded those for the trial court to rule on before review. App. A29. Petitioners ignore these claims, but a new trial will be necessary to resolve them regardless of the outcome of this Petition.

### B. The Issues Raised in the Petition

#### 1. The Court of Appeals Adopted the Correct Standard and Burden for First Amendment Retaliation Claims

Petitioners argue that, concerning the retaliation claims, the court of appeals, first, refused to hold that the mere existence of any "potentially disruptive" impact renders speech unprotected and, second, placed the burden on defendants to show that plaintiffs' speech was unprotected. The first claimed error is no error at all: such impacts are to be *balanced* and do not, in and of themselves, render speech unprotected.[7] The second claimed error simply did not occur.

The court of appeals clearly and correctly set out the standards and burdens regarding a First Amendment retaliation claim:

> Examination of a teacher's claim of retaliation based on engagement in protected activity requires a three step process. First, the plaintiff must show

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7. Petitioners repeat the district court's error in the Petition, at 12: "Where, as here, the trial court finds that the activity was [potentially] disruptive, plaintiffs have failed to carry their initial burden of proof on the question of whether their conduct is protected." Petitioners, and the district court, leave out the crucial step: any such disruption should be *balanced* against plaintiffs' rights and are not, of themselves, dispositive.

that s/he engaged in protected activity. *See Pickering v. Board of Education,* 391 U.S. 563 (1968). In that case the Court stated that "the interests of the [employee] as a citizen, in commenting upon matters of public concern" must be balanced against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees," *id:* at 568, and held that comment on matters of legitimate public concern by public school teachers is ordinarily protected activity. Secondly, a claimant who demonstrates that the activity was protected must then show that the activity was a substantial or motivating factor in a decision or action taken against the claimant. *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274, 287 (1977). Third, the defendant can still defeat plaintiff's claim by demonstrating that the same action would have been taken even in the absence of the protected conduct. *Givhan v. Western Line Consolidated School District,* 439 U.S. 410, 416-17 (1979); *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. at 287. Put in another way, the employee can prevail only if the court finds that but for the protected activity, the employee would not have been removed. App. A15.

In its later consideration of the specific retaliatory actions in the case, the court of appeals extensively discussed the *Pickering* balance and determined, as previously noted, that the trial court erred in holding that a "potential disruption" of itself renders speech unprotected rather than balancing conflicting rights and interests. App. A26-A27. Nowhere does the court of appeals state that defendants have the burden in this regard; rather, as quoted above, they explicitly state that plaintiffs have that burden.

Petitioners distort the court of appeals decision by citing to language, in the section dealing with *restric-*

*tions* on speech, in which the lower court stated, "[t]hat much of the activity engaged in by plaintiffs falls within the protection of the First Amendment seems too evident to require any discussion except that acknowledgment of that fact was not expressly made by the district court." App. A16. Petitioners failed to note that the court, in footnote 4 (App. A17), explicitly defined what it meant by the phrase "protection of the First Amendment," namely that it was used to denote language or activity which falls into the category of "speech". The footnote goes on to state that such speech might have diminished protection under circumstances such as a dismissal and refers to their later discussion of *Pickering*.

It is clear that the court of appeals (unlike the district court) was very sensitive to the important balancing necessary in the case of a claimed retaliatory dismissal of a public employee. Nor did the court state or imply that defendants have the burden of proof in assessing the balance; any suggestion by petitioners to the contrary grossly misinterprets the decision.[8]

Additionally, it should be noted that, contrary to the impression given in the Petition, the district court did not reject all of plaintiffs' claims of retaliatory action based upon findings of disruption. Although there is general language in the trial court's oral opinion about the disruptive effect of the tactics of plaintiffs, he did not conclude in that statement or in the detailed written findings that all of plaintiffs' activities fell outside the First Amendment. In fact, in the written decision, in

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8. Defendants refer, in this regard, to the court's statement that they would have an "opportunity to show" that plaintiffs' activity was not protected. Petition, at 13, quoting Opinion, App. A25. It is stretching beyond reason to suggest that this accomplishes, or even is about, a placement of the burden on defendants. The district court dismissed plaintiffs' case after the completion of plaintiffs' evidence. Thus, defendants have had no opportunity, as yet, to offer proof, and the court is merely noting in the passage referred to that defendants will have that opportunity on remand.

which each incident is discussed, the district court made only three specific findings that plaintiffs' activities were unprotected: (1) the activities in Dr. Willis' class; (2) Trotman's expression of criticism or dissent; and (3) Johnson's statements concerning Defendant Branson. The court of appeals agreed as to the first incident, and took no definitive position on whether, in the latter two situations, defendants' actions violated plaintiffs' constitutional rights, only noting, correctly, that the trial court was erroneous if it concluded that, based upon the content alone, Dr. Johnson's criticism of the President of the University placed it outside the First Amendment. App. A17-A18.

The trial court rejected most of plaintiffs' claims of retaliatory action on the ground that defendants had taken such actions for reasons other than plaintiffs' protected activities. It is based upon this conclusion that the court of appeals reversed, since such a conclusion must be questioned in light of the trial court's error in placing the burden on plaintiffs to show that such action would not have occurred but for the protected conduct.

In summary, the court of appeals has carefully followed the rules established by this Court concerning claims of retaliatory action by a public employer. Although petitioners may object to the application of those standards to their conduct or wish to urge this Court to modify its rulings, at this stage of the proceedings review is not justified and would serve little until the trial court has applied those standards to the specific claims made by plaintiffs.

**2. The Court of Appeals Clearly Followed This Court's Decisions Concerning Plaintiffs' Claims of Restrictions Placed on Their Protected Speech**

Petitioners essentially raise two issues concerning the court's decision on plaintiff's restriction claims: (1) are prior restraint standards appropriate in this case; and (2) is there a justiciable controversy?

Petitioners' analysis is basically defective in two regards. First, Petitioners have ignored entirely the reasons for the court of appeals' reversal of the district court with respect to these claims. As previously noted, the trial court rejected plaintiffs claims on the grounds that defendants acted in good faith and that plaintiffs were not sufficiently deterred from exercising their rights of expression. *Nowhere* in its opinion did the district court conclude that: (1) the law concerning restrictions on prior restraints was not relevant to these claims; (2) with regard to these incidents of restrictions, activities by plaintiffs were not protected by the First Amendment; or (3) plaintiffs' claims were not justiciable, although defendants vigorously presented this theory to the trial court. Petitioners wholly fail to address the reasons given by the court of appeals for reversal of the trial court or to present any reason why the case should be reviewed by this Court at this point.

In any event, the court of appeals accurately stated the law with regard to prior restraints on speech, and Petitioners have failed to present any authority, of this Court or any other court, that conflicts with the court of appeals. As Petitioners noted, those courts which have reached the question whether actions by school officials or other public administrators threatening discipline of or reprimanding employees for their speech have concluded that such actions may amount to First Amendment violations. See, e.g., *Yoggerst* v. *Stewart*, 623 F.2d 35 (7th Cir. 1980); *Aebisher* v. *Ryan*, 622 F.2d 651 (2d Cir. 1980). These decisions are consistent with the well-recognized rule that direct threats of sanctions or other, lesser means of coercion and intimidation short of direct prohibition may amount to constitutional violations. See *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967); *Bantam Books* v. *Sullivan*, 372 U.S. 58 (1963). Restrictions on speech prompt this analysis whether they are made by a university president, *Healy* v. *James*, 408 U.S.

169 (1972), through a notice from a state agency, *Bantam Books* v. *Sullivan, supra,* or through a memorandum from a director of a local agency, *Alderman* v. *Philadelphia Housing Authority,* 496 F.2d 164 (3d Cir. 1974).

What is critical in determining a First Amendment violation is whether an official with authority has issued a restriction prohibiting or suppressing protected activity without sufficient state interest to justify such an encroachment. This is true whether such prohibition is labelled a prior restraint or not. See *Near* v. *Minnesota,* 283 U.S. 697 (1931); *Pickering* v. *Board of Education, supra.* The court of appeals correctly noted that prior restraint requires a greater showing in order to justify such a restriction, but balancing is required in both situations. It is untenable to suggest that a university administrator can never be challenged for attempts at suppressing speech, particularly in light of the value placed in an academic community on the free flow of ideas. See *Tinker* v. *Des Moines Community School District,* 393 U.S. 503, 506-07 (1969). The court of appeals decision is entirely consistent with these decisions, and Petitioners have failed to present any conflicting authority. At most, Petitioners can be understood to be objecting to the application of the law to this case, but since a final determination of that question has not been made by the lower courts, review at this time is not justified.

Petitioners have further obscured this analysis by discussing authority that some challenges to regulations that seem to suppress expression may not be justiciable because the claims therein lack a case or controversy. Neither of the lower courts found this relevant because many of the threats in this case are explicit, specifically directed and in writing. The case or controversy requirement is satisified whenever there is a "genuine threat" of adverse action. *Ellis* v. *Dyson,* 421 U.S. 426 (1975); *Steffel* v. *Thompson,* 415 U.S. 452 (1974). The decision

of the District of Columbia Circuit that Petitioners claim is in conflict with this decision, *National Treasury Employees Union* v. *Kurtz*, 600 F.2d 984, 986-89 (D.C. Cir. 1979), denied relief specifically because the regulation challenged there was generally directed and did not specify punishment or define the conduct that will be disciplined. The court explicitly distinguished the situation where — as in this case — there is a "credible threat." As the court of appeals here noted, in this case there were several specifically directed, explicit threats of dismissal for specifically defined (and protected) conduct, other language which "implicitly" threatened action and acts of retaliation. The "genuine threat" standard was clearly satisfied.

### 3. The Court of Appeals Did Not Reject the Balancing Test in Assessing Plaintiffs' Restrictions Claims

Defendants assert that, in assessing plaintiffs' claims of restrictions on speech, the court of appeals rejected the balancing test and foreclosed any consideration of the administration's interests in promoting the efficient operation of the University. The court simply did not make either ruling.

The *sole* basis for defendants' assertion is their reference to the court's comparison of the standards governing retaliations and restrictions. Petition, at 21. Though Petitioners use ominous language and predict grave consequences, all the court said is that prior restraints are particularly disfavored in our system and tradition of civil liberties, which has been accepted since *Near* v. *Minnesota*, *supra* was decided in 1931. Indeed, as we have detailed above, the court discussed balancing extensively, and it specifically recognized the needs of the University in any such balance: "We do not intimate that a University or other public employer cannot properly promulgate a general rule giving notice that employ-

ees who engage in conduct which causes disruption are subject to disciplinary action." App. A25 n.8.

Three additional points should be noted: (1) the district court did not find plaintiffs' speech in these restriction incidents was unprotected but denied relief on other grounds discussed above;[9] (2) there is no evidence that such speech was unprotected (defendants' counsel even specifically admitted in his testimony that the vigil at issue in the telegram incident was protected); and (3) defendants' repeated statements to the effect that the lack of findings by the court of appeals of clearly erroneous factual determinations below somehow indicates an acceptance of those determinations (e.g., Petition, at 4, 22) are inappropriate since the court explicitly stated that it was not reaching that question because of legal errors that required reversal (App. A28 n.12).

### 4. The Court of Appeals Decision Will Not Have An Adverse Impact on the Administration of a University

Petitioners' final argument is that the application of the court's analysis would substantially interfere with the operation of any university. This is an exaggerated assertion that is particularly inappropriate given the current disposition of the case. The court of appeals has only stated that faculty members may come to federal court to seek judicial scrutiny of alleged administration prohibitions against speech and retaliatory actions based on speech. Plaintiffs emphatically reject Petitioners'

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9. The restrictions included: (1) the telegram from the University's counsel to several of the plaintiffs notifying them of possible dismissal if they picketed on the occasion of President Ford's visit to the campus; (2) several threatening letters to plaintiffs by the administration concerning plaintiffs' statements to the press; and (3) a letter threatening dismissal for making a motion at future faculty meetings. Nowhere in the trial court's detailed findings did it state or imply that the specific speech involved in these incidents was disruptive and therefore unprotected by the First Amendment.

suggestion, which they seem to make, that administrators of public colleges should be wholly free from federal court scrutiny of their actions that infringe on First Amendment rights. The appropriate resolution of the conflicting rights and interests is the balancing test mandated by this Court and the court of appeals, which has not, as yet, been applied to the facts in this case.

## CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted

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